STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2008
v	No. 278742 Wayne Circuit Court
DWAYNE ROBINSON, Defendant-Appellant.	LC No. 07-004303-01

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of possession with intent to deliver less than 50 grams of controlled substance, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent terms of four months to 20 years' imprisonment for each controlled substance violation to run consecutive to two years' imprisonment for the felony-firearm violation. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that his conviction was against the great weight of the evidence because defendant's witnesses, who were more familiar with defendant and could readily identify him, contradicted the prosecution's evidence. We disagree. To preserve an argument that a verdict is against the great weight of the evidence, defendant must file a motion for a new trial with the trial court. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Because defendant did not move for a new trial in the trial court, the issue is unpreserved for appellate review; therefore, this Court reviews the issue for plain error affecting substantial rights. *Id*.

To determine whether a verdict is against the great weight of the evidence, the Court must determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Typically, this issue involves weighing matters of credibility and circumstantial evidence. *Id*. However, conflicting testimony alone is not enough to justify a new trial "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it.'" *Id*. at 645-647, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 410, 412; 124 NW2d 255 (1963). Other examples of evidence that might preponderate so heavily against the verdict that a new trial is warranted

include where the testimony "contradicts indisputable facts or laws," "a witness's testimony is so inherently implausible it could not be believed by a reasonable juror," or the testimony "has been seriously impeached and the case marked by uncertainties and discrepancies." *Lemmon*, *supra* at 643-644 (citations and internal quotations omitted). None of these situations exist in this case.

Ultimately, this case boils down to the perceptions and credibility of the police officers who arrested defendant. Defendant argues that because the police officers were unfamiliar with defendant and the conditions for identification were not ideal, their identification of defendant as the individual who threw the drugs and ran away is unreliable. However, in *Lemmon*, *supra*, despite the fact that the defendant and victims gave "diametrically opposed" accounts of an incident, our Supreme Court refused to usurp the role of the jury in determining the credibility of the witnesses and ultimately the weight of the evidence. *Id*. at 646-647. The Court held that questions of witness credibility are generally not grounds for a new trial, and the trial court deciding a new trial motion should generally refrain from substituting its own judgments of witness credibility for those of the jury. *Id*.

In this case, there are two different versions of what took place on December 6, 2006. The police version has defendant as an active participant in dealing drugs, and upon noticing the police, dropping an eyeglass case filled with narcotics and then leading the police on a foot chase. Defendant's version is that this is a case of mistaken identity and that he was in the wrong place at the wrong time with a gun and a large amount of cash, both of which had reasonable explanations. However, during the trial, the prosecution's evidence was not impeached by defendant to the point where it lacked any probative value or could not reasonably be believed. In fact, defendant does not attack the police testimony but only asserts that the neighborhood witnesses are more credible. As in *Lemmon*, *supra* at 646-647, when there are two "diametrically opposed" accounts of an incident, it is the role of the jury to determine which version is more credible. Here, the jury, through its deliberations, found the police version more credible. Defendant has failed to prove that the jury verdict is against the great weight of the evidence and that it would be a miscarriage of justice to allow the verdict to stand.

We find, after reviewing the record, there is no indication that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly